BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	WT Docket No. 14-170
Updating Part 1 Competitive Bidding Rules	)	

COMMENTS OF THE AUCTION REFORM COALITION

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CONTENTS

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To: The Commission

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The Auction Reform Coalition ("ARC" or the "Coalition"), by its undersigned attorneys, respectfully submits these comments responding to the changes to the competitive bidding rules proposed by the Federal Communications Commission ("Commission" or "FCC") in the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

I. Introduction and Summary

The ARC is comprised of a diverse group of individuals and companies with deep roots in the mobile wireless services industry. Its members include individuals and privately held companies with longstanding investments in broadband spectrum businesses, former management-level principals of companies with impressive records in the construction and operation of broadband networks and the provision of broadband services, venture capital funds with significant portfolio investments in broadband companies, and entrepreneurs with successful track records in the development of spectrum-related enterprises and other technology ventures.[2] The participants have

[1] *In the Matter of Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, Notice of Proposed Rulemaking, 29 FCC Rcd. 12426 (2014) ("*NPRM*").

[2] The identities of the members of ARC will be disclosed to the Commission on a confidential basis upon request.

joined the Coalition because of their belief that, in their current form, the rules do not create sufficient spectrum-based opportunities for small businesses, including businesses owned by minorities and women ("designated entities," or "DEs"), and because, absent change, the increasing concentration of the wireless industry in the hands of a few large incumbents will continue. The Coalition members also believe that designated entities bring elements of entrepreneurship and innovation to spectrum-based businesses that are beneficial and will serve the public interest.

In 2006, authors Gregory Rose and Mark Lloyd released a scholarly study analyzing the FCC's spectrum auctions.[3] Based on the 10 years of data they studied at that time, they concluded that "these auctions, as they have been conducted, serve the narrow interest of dominant actors in the telecommunications industry. They have systematically resulted in market concentration and the growth of oligopolistic market power of the major actors in the telecommunications industry."[4] Auction results since 2006 have only reinforced the conclusions from this study.[5] As a result, the Coalition urges the Commission to adopt certain key proposals it has made to reform the DE program, and to consider certain additional changes that will improve spectrum-based opportunities for designated entities. These changes will serve the public interest and help ensure that the rules align with statutory directives.

As explained below, the Coalition supports the Commission's proposal to apply a two-pronged test to determine eligibility for small business benefits, first determining whether an applicant meets the size standard for small businesses and thus is eligible for benefits, and then

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[3] *See* The Failure of FCC Spectrum Auctions by Gregory F. Rose and Mark Lloyd; https://cdn.americanprogress.org/wp-content/uploads/kf/SPECTRUM_AUCTIONS_MAY06.PDF ("Rose and Lloyd").

[4] *Id.* at p. 22.

[5] As discussed in greater detail below (pages 18-19), the results in Auction 66, which concluded in 2006 after the release of the Rose and Lloyd study, indicate that only 5.24% of the gross winning bids came from DEs. In Auction 73 (2008), only 3.45% of the gross winning bids came from DEs.

determining whether the entity controls the spectrum associated with the licenses for which it seeks DE benefits.[6] In particular, ARC urges the Commission to eliminate the existing "facilities-based service" policy adopted in 2006, as well as the attributable material relationship or AMR rules, to utilize a case-by-case approach to analyze control and affiliation, and to include only the revenues of the applicant, its controlling interests, and their affiliates to establish an entity's size.

ARC also recommends that the Commission take steps to increase DE participation and success in spectrum auctions. Specifically, the Commission should raise gross revenue thresholds for establishing eligibility as a small business, increase bidding percentages awarded to qualifying small businesses, adopt a "localism" bidding credit, and encourage pro-competitive joint bidding arrangements between DEs and non-DEs. Finally, ARC opposes any rule that would require a small business to reimburse its bidding credit due to loss of small business status based on the status of its construction.

II. The Proposed Changes to the DE Rules Are Necessary and Timely

The Coalition commends the Commission for initiating a comprehensive review of its DE rules. This proceeding is timely given the "historic potential" for DEs to acquire low band (below-1 GHz) broadband spectrum in the upcoming Broadcast Television Incentive Auction ("BIA").[7] ARC strongly supports the Commission's goal of adopting new rules "soon enough to allow all parties to account for any changes while planning for the BIA,"[8] and urges the Commission to ensure that the updated rules are in place well before the deadline for filing applications to participate in the BIA. It

[6] *See NPRM* at ¶¶ 28-31.

[7] *Id.* at ¶ 1.

[8] *Id.*

is clear that the BIA will be the most complex spectrum auction ever held,[9] with the potential to raise more revenues than any single prior auction.[10] Moreover, the BIA will be the last opportunity for the foreseeable future for DEs to acquire auctioned licenses for lower band spectrum ideally suited for mobile wireless services. However, if DEs are to have any prospect of succeeding in the BIA, "small businesses need greater opportunities to gain access to capital."[11] Therefore it is critical that the Commission adopt rules that fully and faithfully implement clear Congressional objectives regarding DEs.

A. The Public Interest Will Be Served by Creating Increased Opportunities for DEs

The *NPRM* seeks to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women . . . are given the opportunity to participate in the provision of spectrum-based services."[12] Leaving aside the critical fact, which the *NPRM* expressly recognizes, that this outcome has been mandated by Congress,[13] creating opportunities at this time for DEs is good public policy and will serve the public interest.

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[9] *See In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd. 12357, ¶¶ 4-8 (2012) (observing that "[t]he broadcast television spectrum incentive auction will be the first such auction ever attempted worldwide. It will be a groundbreaking event for the broadcast television, mobile wireless, and technology sectors of our economy.").

[10] *See* "FCC's estimated opening bids for 600 MHz auction 'grossly' undervalues licenses, broadcaster group says," Fierce Wireless, Feb. 9, 2015, *available at* http://www.fiercewireless.com/story/fccs-estimated-opening-bids-600-mhz-auction-grossly-undervalues-licenses-br/2015-02-09; "FCC Pitches $38B Reasons for Incentive Auction," Multichannel News, Oct. 1, 2014, *available at* http://www.multichannel.com/news/technology/fcc-pitches-38b-reasons-incentive-auction/384323.

[11] *NPRM* at ¶ 11.

[12] *Id.* at ¶ 1.

[13] *See* 47 U.S.C. § 309(j)(4)(D) (requiring that, when the Commission prescribes regulations in designing systems of competitive bidding, it shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the

While the current wireless landscape is dominated by four large providers with nationwide footprints, the incredible success of mobile wireless services has been spurred by an impressive cast of individuals and entrepreneurs, many of whom got their start, or built their businesses, with the assistance of the Commission's DE program. For example:

MetroPCS Communications, Inc. began in 1994 as a designated entity participant in Auction 5 in which its predecessor-in-interest, GWI PCS, Inc., acquired 15 licenses.[14] MetroPCS's founder, wireless entrepreneur Roger Linquist, ran the company until control was transferred to Deutsche Telekom/T-Mobile USA in 2011. At the time of the transfer, MetroPCS had grown to become the fifth largest facility-based provider of broadband wireless services in the U.S., with licenses covering 142 million people and approximately 9 million customers.[15] MetroPCS generally is credited with the development and success of fixed price, paid-in-advance wireless services offered with no long-term contract.

Leap Wireless International/Cricket first qualified as a designated entity in the FCC's re-auction of PCS spectrum in Auction 22 in 1999, in which it acquired 36 licenses.[16] Leap acquired additional licenses with bidding discounts in Auction 35.[17] By 2001, the coverage areas of the Leap/Cricket licenses encompassed more than 70 million people in 36 states.[18] At the time of its

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opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences.").

[14] *See Entrepreneurs' C Block Auction Closes*, Public Notice, DA 96-716 (rel. May 8, 1996) ("*C Block Closing PN*").

[15] MetroPCS Communications Inc., Proxy Statement (Schedule 14A), Dec. 21, 2012, p. 49.

[16] *See C, D, E, and F Block PCS Auction Closes*, Public Notice, Attachment A, 14 FCC Rcd. 6688 (WTB 1999) ("*Auction 22 Closing PN*").

[17] *C and F Block Broadband PCS Auction Closes (Auction 35)*, Public Notice, DA 01-211 (rel. Jan. 29, 2001) ("*Auction 35 Closing PN*").

[18] *See* History of Leap International, Inc.*, available at* http://www.fundinguniverse.com/company-histories/leap-wireless-international-inc-history/.

sale to AT&T Wireless in 2014, Leap's network covered approximately 96 million people and served over 4.5 million customers in 35 states in the U.S.[19] Leap/Cricket also was a major provider of prepaid, flat fee wireless services.

Omnipoint Corp. and Cook Inlet Region Inc. each succeeded in assembling an impressive array of DE licenses in Auctions 5, 10, 11, 22, 35, and 58.[20] One of the founders of Omnipoint, George Schmitt, was inducted into the Wireless Hall of Fame in 2014 in recognition of his success in building a large PCS network and being at the forefront of advanced wireless technologies, including GSM, GPRS packet data, EDGE, positioning and Internet access.[21] When Omnipoint and Cook Inlet combined with VoiceStream Wireless Corp. in 1999, the resulting company became one of the nation's largest wireless communications companies, holding licenses to provide service to over 175 million people from New York to Hawaii.[22]

Dobson Corporation, through its affiliate DCC PCS, acquired DE licenses in Auction 11.[23] When Dobson was acquired by AT&T in 2007 it was the third largest provider of GSM service in the U.S. with a network covering rural and suburban areas in 17 states.[24]

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[19] *See* "AT&T to Acquire Leap International," *available at* http://www.att.com/gen/press-room?pid=24533&cdvn=news&newsarticleid=36744&mapcode=.

[20] *See C Block Closing PN, supra*; *Entrepreneurs' C Block Reauction Closes*, Public Notice, DA 96-1153, Attachment A (rel. July 17, 1996) ("*C Block Reauction Closing PN*"); *Auction 22 Closing PN, supra*; *Auction 35 Closing PN, supra*; *Broadband PCS Auction Closes (Auction 58)*, Public Notice, DA 05-459 (rel. Feb. 18, 2005) ("*Auction 58 Closing PN*").

[21] *See* Wireless History Foundation, *available at* http://www.wirelesshistoryfoundation.org/whf-hall-fame/member-directory/george-schmitt.

[22] *See* "VoiceStream, Omnipoint Merge," *available at* http://money.cnn.com/1999/06/23/deals/omnipoint.

[23] *D, E & F Block Auction Closes (Auction No. 11)*, Public Notice, DA 97-81 (rel. Jan. 15, 1997).

[24] *See* Dobson Communications Company History, *available at* http://www.fundinguniverse.com/company-histories/dobson-communications-corporation-history/.

One can only imagine how much greater the success of these and other DEs would have been but for the cataclysmic default of NextWave Personal Communications ("NextWave") on its designated entity licenses.[25] NextWave was the high bidder on 56 licenses in Auction 5 (C Block) and 7 licenses in Auction 10 (C Block Reauction).[26] Unable to pay for the licenses on which it bid, NextWave sought protection under federal bankruptcy laws. As a result, its licenses became tied up in litigation for nearly a decade and the Commission's designated entity program fell into disfavor. The Commission has long since abandoned the installment payment program that allowed NextWave and other auction winners to speculate and bid for licenses they could not afford.[27] The Commission now requires high bidders to promptly pay the entire amount of each winning bid, before the license is granted, pursuant to the long-form application process.[28] This rule change has virtually eliminated payment defaults and has effectively prevented undeveloped spectrum from lying fallow for years by being tied up in a bankruptcy proceeding.

There is, however, another controversial aspect of the designated entity program that was not addressed by elimination of the installment payment program. Alliances between large incumbent carriers and DEs gave rise to questions as to whether certain DEs were mere "straw

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[25] For example, Salmon PCS was a very small business DE formed by wireless entrepreneur George D. Crowley Jr. Mr. Crowley's prior company, Crowley Cellular, had become the second largest privately held owner and operator of cellular licenses when the company was sold in 1991. Salmon PCS then became the high bidder on 79 licenses in 2001 in Auction 35, in which the spectrum defaulted on by NextWave was re-auctioned. *See Auction 35 Closing PN, supra.* Ultimately, however, almost one-half of the Salmon PCS licenses were returned to NextWave following the Supreme Court decision (*FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003)). This left Salmon PCS with too few licenses to build a stand-alone business.

[26] *See Auction 5 Closing PN, supra*; *C Block Reauction Closing PN, supra.*

[27] In Auctions 5 and 10, bidders were required to deposit just 5% of each winning bid at the end of the auction and another 5% at the time of license award. Thereafter, licensees were allowed to make installment payments at the 10-year Treasury rate with interest-only payments for the first six years. This approach resulted in speculation, encouraged applicants to bid on licenses they could not afford and resulted in wide scale defaults. *See* Crampton, Peter, The Efficiency of Spectrum Auctions, http://marketdesign.com/files/98jle-efficiency-of-the-fcc-spectrum-auctions.pdf.

[28] 47 C.F.R. §§ 1.2107(b), 1.2109(a).

men" or surrogates for well-established companies.[29] While controversy about the DE program waned after the Commission adopted the attributable material relationship ("AMR") rule in 2006,[30] recent events indicate that this debate is not over. Based on reports that two applicants in which DISH Network Corp. ("DISH") has an 85% equity stake (collectively, the "DISH DEs") are claiming more than $3 billion in bidding credits in the recently completed Auction 97 (AWS-3), Commissioner Pai has expressed concern that it is an abuse of the DE program for a large, well-capitalized public company such as DISH to benefit from bidding discounts.[31]

The Coalition is confident that the Commission will carefully scrutinize the qualifications of the DISH DEs in the course of the Auction 97 long-form application process. However, the need for the Commission to adopt changes to the DE rules is indicated *regardless of how the DISH DE applications are resolved*. If the DISH DEs receive grants, the overall outcome of Auction 97 will confirm that one effective way for a DE to succeed in a meaningful fashion in today's spectrum marketplace is by entering into a strategic relationship with a large player. The proposal in the *NPRM* to revisit the AMR rule was motivated in part by the recognition that strategic relationships with incumbent carriers can facilitate the financing of successful spectrum-based ventures. Specifically, the Commission noted that relaxing restrictions on material relationships could advance the goal of "affording small businesses reasonable flexibility to obtain the capital necessary to

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[29] *See generally Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd. 4753 (2006); *see also id.*, Statement of Commissioner Copps.

[30] *See* 47 C.F.R. § 1.2110(b)(3)(iv)(a). *See also NPRM* at ¶ 15.

[31] *See Statement of Commissioner Ajit Pai on Abuse of the Designated Entity Program*, News Release (Feb. 2, 2015).

participate in the provision of spectrum-based services."[32] The Coalition agrees that this is a worthy goal.

Even if the Commission ultimately decided to deny granting licenses to the DISH DEs, the need for reform of the designated entity program would remain, arguably more than ever. Excluding the DISH DE licenses, and assuming all remaining licenses are granted to the provisionally winning bidders, the result would be that only 13% of the AWS-3 licenses will have been granted to qualified DEs, mostly in smaller, less populated areas. This underscores the concern expressed in the *NPRM* that the DE rules in their present form "have had the unintended consequence of hindering the Commission's ability to satisfy its statutory goal of promoting opportunities for wireless entry by small businesses."[33]

B. The Current Rules Are Ripe for Review

The DE rules have enabled many entrepreneurs to enter the wireless services market since the first spectrum auction in 1994.[34] However, over the past decade, the playing field has tilted away from small businesses. For this and other reasons, the current rules are ripe for review. Many of the DE rules have not been revised since they were first adopted.[35] And, most notably, the Commission has not revisited the rules since its last major revision in 2006 when it adopted the AMR rule. That rule change limited the ability of a small or very small business to obtain DE benefits if it had certain specified material relationships with a much larger, well-capitalized entity. This effectively

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[32] *NPRM* at ¶ 24.

[33] *Id.* at ¶ 23.

[34] To be sure, many DEs have sold their businesses as the mobile services industry has become increasingly concentrated. ARC notes, however, that T-Mobile, which has a track record of acting as a disruptive force in the industry, acquired many of the DEs. ARC believes that this is in part due to the continuing effect of the entrepreneurial spirit of the designated entities acquired by T-Mobile.

[35] *See id.* at n.10 & ¶ 50.

foreclosed potentially significant avenues of access to capital and had the unfortunate effect of dramatically reducing the success of DEs in subsequent auctions. With a new generation of DEs on the horizon, facing substantially increased costs to acquire spectrum rights and other necessary inputs, in addition to deeply entrenched competitors in a highly concentrated market, the Commission's proposals in the *NPRM* are timely.

C. Reform of the DE Rules Is Needed to Comply with Statutory Requirements

Reexamination of the DE rules is critical if the Commission is to achieve its statutory mandates. Specifically, the Communications Act of 1934, as amended ("Act"), directs that

> in specifying eligibility and other characteristics of [licenses issued by competitive bidding], and in designing the methodologies for use under [Section 309(j)], the Commission . . . shall seek to promote . . . the following objectives: . . . promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people *by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women*.[36]

In the *NPRM*, the Commission asserts that it is a "mistake[] [to] focus on the success rate of small businesses as opposed to whether the Commission has met its statutory goal of providing DEs with 'opportunities' to participate [in] the provision of spectrum based services as the language of Section 309(j) requires."[37] In ARC's view, this assertion misreads the statute. Giving DEs the opportunity to compete for licenses at auction is not the same as providing them the ability to actually participate meaningfully in the *provision* of spectrum-based services. Moreover, the Commission may not read Section 309(j)(4)(D) in isolation. The introduction to Section 309(j)(4) clearly states that the Commission must follow the dictates of Section 309(j)(3) in implementing the

[36] 47 U.S.C. § 309(j)(3)(B) (emphasis added).

[37] *NPRM* at n.68 (citing 47 U.S.C. § 309(j)(4)(D)).

statute.[38] Those include "avoiding excessive concentration and . . . *disseminating licenses* among a wide variety of applicants, including small businesses. . . ."[39]

Properly viewed, Section 309(j)(3)(B) specifically requires the Commission to ensure that licenses are "disseminat[ed]" to a wide variety of applicants, including small businesses. "Disseminated" in this context can only mean "issued" or "granted." Therefore, the Commission is not merely permitted, but rather is obligated, to consider the number of licenses acquired by DEs through the auction process. And, in the view of ARC, the Commission also should consider the geographic areas and populations served by the licenses granted to DEs.[40] The Act requires it to do so, just as it requires the Commission to consider evidence of market concentration in seeking to avoid excessive concentration of licenses. In short, the Commission cannot claim to have satisfied its statutory obligation simply by pointing to the fact that DEs showed up to bid, only to find that they lacked the resources to succeed.

Importantly, the Commission already has acknowledged that the objective of avoiding excessive concentration has not been met. The Commission found in 2014 that "[t]oday's mobile wireless marketplace is characterized by factors . . . including high market concentration, highly concentrated holdings of low-band spectrum, high margins, and high barriers to entry."[41] This

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[38] In relevant part, the statute states that, "[i]n prescribing regulations pursuant to" the mandates of Section 309(j)(3) the Commission must provide the "opportunity to participate." 47 U.S.C. § 309(j)(4).

[39] 47 U.S.C. § 309(j)(3)(B) (emphasis added).

[40] As discussed in greater detail within, the number of licenses granted to DEs can be misleading if all they manage to win are small market areas with little population. The Coalition submits that the relative number of dollars spent by DEs and non-DEs in the auction is a better indicator of whether licenses have been widely disseminated and whether undue concentration has been avoided as required by the statute.

[41] *In the Matter of Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd. 6133, ¶ 62 (2014) ("*Mobile Spectrum Holdings Order*").

market concentration is not recent, has been accelerating, and is supported by extensive data, whether measured in terms of licenses, revenues, or subscribers:

- **Spectrum Suitable for Mobile Wireless Services**. Just five years ago, five wireless carriers held licenses for more than 80% of spectrum suitable for mobile wireless services, measured on a MHz/POP basis.[42] By June 2014, approximately the same percentage of licenses for such spectrum was held by the remaining four nationwide wireless carriers, although this "represent[ed], in absolute terms, an increase in the total spectrum holdings of the nationwide service providers since [2013], given the increase is the spectrum included in the spectrum screen. . . ."[43]
- **Below-1-GHz Spectrum**: As of June 2014, the four nationwide carriers held licenses for a combined 85% of below-1-GHz spectrum (cellular, 700 MHz) on a MHz/pop basis, with AT&T holding approximately 42% and Verizon approximately 38%.[44]
- **Mobile Wireless Subscribers**: In 2003, six nationwide wireless carriers accounted for 79% of mobile wireless subscribers.[45] A decade later, the four remaining nationwide carriers had a combined market share of approximately 97% of subscribers.[46]

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[42] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd. 11407, ¶ 267 (2010).

[43] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, DA 14-1862, ¶ 104 (WTV, rel. Dec. 18, 2014) ("*Seventeenth Mobile Competition Report*").

[44] *Id.* at ¶ 106 & Chart IV.A.2.

[45] *Mobile Spectrum Holdings Order* at ¶ 25.

[46] *Id.*

- **Mobile Wireless Service Revenues**: In 2005, five nationwide wireless carriers reaped 88.4% of the nation's mobile wireless service revenues;[47] by 2014, that figure had increased to 96% for the remaining four nationwide carriers.[48]
- **Herfindahl-Hirschman Index ("HHI")**: The HHI scale, which is used to measure concentration in competition analysis, considers a "highly concentrated industry" to be one with an HHI above 2500.[49] In 2006, when the Commission last revised the DE rules, the HHI for the wireless industry (measured on an economic area basis) was 2706.[50] By the end of 2013, the HHI for the wireless industry had increased to 3027.[51]

Concurrent with growing concentration of the mobile wireless market has been a decrease in the "disseminati[on] [of] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," as the *NPRM* acknowledges.[52] At the three major auctions of mobile wireless service licenses preceding Auction 97, DEs won approximately 50% (108 of 217) of the licenses sold in Auction 58, approximately 20% (215 of 1,087) of the licenses sold in Auction 66, and approximately 35% (379 of 1,090) licenses sold in Auction 73.[53] And, as discussed in greater detail below, the results are even

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[47] *Seventeenth Mobile Competition Report* at ¶ 29 & Table II.C.1.

[48] *Id.* at ¶ 30 & Table II.C.2.

[49] *Id.* at ¶ 32 & n.46.

[50] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Eleventh Report, 21 FCC Rcd. 10947, ¶ 45 (2006).

[51] *Seventeenth Mobile Competition Report*, ¶ 33.

[52] *NPRM* at ¶ 6 (noting decrease in the number of small and regional mobile service providers).

[53] *See Broadband PCS Auction Closes, Winning Bidders Announced for Auction 58*, Public Notice, Attachment A, 20 FCC Rcd. 3703 (2005) ("*Auction 58 Closing PN*"); *Auction of Advanced Wireless Services Licenses Closes, Winning Bidders Announced for Auction 66*, Public Notice, Attachment A, 21 FCC Rcd. 10521 (2006) ("*Auction 66 Closing PN*"); *Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 73*, Public Notice, 23 FCC Rcd. 4572 (2008) ("*Auction 73 Closing PN*").

more discouraging if the Commission considers the relative dollar value of the licenses acquired by DEs versus non-DEs. Because there is a close correlation between the relative cost of licenses and the population within the service area, the fact that non-DEs have spent the vast majority of the money at each auction indicates that DEs have not fared well. The licenses won by DEs in these auctions were mostly for small markets, and were predominantly acquired by rural telephone companies, and not by small businesses and businesses owned by minorities and women.[54] Results from the recently concluded Auction 97 are inconclusive at this time: including two bidders with close financial relationships with DISH, suggests that 52% of the high bids were made by DEs; excluding those two bidders, however, results in only about 13% of the high bids being made by DEs.[55] Notably, T-Mobile President John Legere has characterized Auction 97 as "a disaster" with three companies buying "a ridiculous 94 percent of the spectrum sold at auction."[56]

When Congress granted the Commission authority to conduct spectrum auctions, it foresaw that, unless the Commission "is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications businesses."[57] Section 309(j)(3)(B) expresses Congressional intent that the Commission be vigilant against such concentration. Nevertheless, the concentration of wireless licenses in the hands of a small number of large incumbents continues to increase with each auction, in direct contravention

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Excluding the 151 licenses won at Auction 73 by a single bidder owned 85% by the fifth-largest mobile provider, however, the percentage of licenses on which DEs were the high bidder was virtually the same in Auction 66 and Auction 73.

[54] *See* Minority Media & Telecom Council, Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry, GN Docket No. 12-268, at 14 (Feb. 27, 2014) ("MMTC White Paper").

[55] *See Auction of Advanced Wireless Services (AWS-3) Licenses Closes*, Public Notice, Attachment A, DA 15-131 (Jan. 30, 2015) ("*Auction 97 Closing PN*").

[56] Communications Daily, Vol. 35, No. 33, Feb. 19, 2015, p. 12.

[57] H.R. Rep. No. 103-111 at 254 (1993).

of statutory directives. This fact highlights the need for significant DE rule changes to achieve the purposes of the Act. Making these changes effective prior to the BIA will help ensure that this concentration does not become even more deeply entrenched.

III. ARC Supports the Proposed New Standard for Evaluating DE Eligibility

In the *NPRM*, the Commission proposes several changes to the rules by which eligibility for DE benefits is determined. As discussed below, the Coalition generally supports these changes and believes that the proposals, in combination with other revisions discussed in these comments, strike a "reasonable balance between the competing goals of affording [DEs] reasonable flexibility to obtain the capital necessary" to acquire licenses and thereby have the opportunity to participate in the provision of spectrum-based services, consistent with the Act, while "effectively preventing unjust enrichment of ineligible entities."[58]

A. The Commission Should Eliminate the "Facilities-Based Service" Policy

The *NPRM* contains a thoughtful reexamination of the decade-old policies that earlier caused the Commission to require that "every recipient of [DE] benefits [be] an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[59] The practical effect of the requirement that every DE directly provide retail facility-based service was to bar every DE from acting as a wholesale service provider or as a "carrier's carrier." DEs also were effectively prohibited from being in the business of leasing spectrum capacity, because any agreement to lease more than 25% of the capacity of a single license to a non-DE

[58] *NPRM* at ¶ 5.

[59] *Id.* at ¶ 22.

created a material relationship that made the revenues of the lessee attributable to the DE and could destroy its DE eligibility.[60]

From a business perspective, these restrictions created significant barriers for DEs. Some mobile virtual network operators ("MVNOs") have enjoyed success in the U.S. For example, TracFone – which does not own or operate its own network but rather offers service through the four nationwide carriers – is by far the largest MVNO in the U.S. TracFone ended the first quarter of 2013 with 23.2 million customers.[61] And, the *Seventeenth Mobile Competition Report* identified 17 other MVNOs providing service in the U.S.[62] Clearly, there is significant potential opportunity for qualified DE licensees to provide wholesale services to entities that want to provide retail services to end user customers. However, the AMR rule largely eliminated this as a viable business plan for DEs.

As a case in point, designated entity Royal Street Communications Corporation ("Royal Street") acquired six licenses in Auction 58 for nearly $300 million, including licenses in Los Angeles, California and Orlando, Florida.[63] Auction 58 took place in 2005, prior to adoption of the AMR rule. The Royal Street business plan called for it to wholesale up to 85% of its capacity to MetroPCS Communications. However, the AMR rule prevented Royal Street from continuing with this business model if it ever sought to acquire additional spectrum in subsequent auctions while the AMR rule was in force. Ultimately, Royal Street exited the business in 2010.

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[60] *See* 47 C.F.R. § 1.2110(b)(iv).

[61] *See* http://www.fiercewireless.com/story/tracfone-acquires-verizon-mvno-page-plus-cellular-and-its-14m-**customers**/2013-05-20.

[62] The Report mentions the following MVNOs that currently provide service in the U.S.: Straight Talk, H2O Wireless, Ultra Mobile, Net10, LycaMobile, Spot Mobile, Telcel America, GIV Mobile, Simple Mobile, Red Pocket, Pure Talk, PagePlus, Ting, iWireless, Voyager, FreedomPop, and ROK Mobile. *See Seventeenth Mobile Competition Report*, Table III.A.v.

[63] *See Auction 58 Closing PN, supra.*

Based on these considerations, ARC urges the Commission to discontinue its policy of requiring small businesses seeking bidding credits to provide primarily direct, facilities-based service using each individual license. Similarly, the Commission should allow spectrum leasing by DEs to non-eligibles, and make clear that DEs may benefit from the *de facto* control standard for spectrum manager leasing under the secondary market rules to the same extent as non-DE lessors.

B. Only the Revenues of the Applicant, Its Controlling Interests, and Their Affiliates Should Be Attributable

The *NPRM* indicates that the Commission is proposing a more focused approach to evaluate small business eligibility.[64] Using its existing controlling interest and affiliation rules, the Commission proposes to count only the revenues of the applicant, its controlling interests, its affiliates, and its affiliates' controlling interests, toward the revenue test. ARC favors this approach. Using the longstanding controlling interest and affiliation definitions has the benefit of adding continuity and predictability to the application process.[65] And, eliminating the attribution of revenues of entities with which an applicant has a "material relationship" serves the public interest as long as the relationship does not vest control in a non-eligible.

C. The Commission Should Eliminate the AMR Rule

ARC agrees with the Commission's proposal to repeal the AMR rule, which establishes several bright-line tests for determining when an agreement between a DE and third parties causes

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[64] *NPRM* at ¶ 28.

[65] In retaining the current affiliation standard, the Commission should reiterate that the ultimate test is whether the entity for which an affiliation determination is being made is found to control, be controlled by, or to be under common control with, the applicant. Otherwise, the laundry list of somewhat vague and undefined relationships that might be deemed to create an affiliation (e.g., affiliation resulting from an identity of interest, spousal or kinship affiliation, common management, contractual relationships, etc.) could be misconstrued to create an affiliation where no true control exists.

the gross revenues of the third party to be attributable to the DE for purposes of determining eligibility.[66] Returning to a case-by-case standard that determines eligibility by utilizing the control and affiliation standards, will align Commission policy with two important realities of the marketplace: first, that relationships with large, successful entities, including mobile wireless incumbents, are critical if DEs are to have access to capital needed to acquire licenses at auction and participate in the provision of spectrum-based services; and, second, that DEs can have such relationships without relinquishing control of their businesses. In particular, repeal of the rule will enable DEs to enter into spectrum leasing and resale arrangements that are less capital intensive and yet could finance both license acquisition and the provision of service. The Commission's continued oversight of DE relationships, through post-auction review of long-form applications and secondary market transactions, as well as its audit authority, are sufficient to ensure that DEs remain qualified to benefit from bidding discounts.

There is clear evidence that the AMR rule has been a deterrent to capital formation. After it was adopted in 2006, there was a precipitous decline in the success of DEs in spectrum auctions. Reflecting their more limited access to capital, DEs have spent substantially less at recent major auctions.[67] At Auction 58, the last auction held before the AMR rule took effect, the net bids of qualified DE license winners represented approximately 50% of all auction revenues.[68] Since Auction 58, there have been three major auctions of mobile wireless service licenses, Auction 66 (AWS-1), Auction 73 (700 MHz), and the recently-completed Auction 97 (AWS-3). At Auction 66, which ended in September 2006, the net bids of qualified DE license winners were less than 5% of

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[66] 47 C.F.R. § 1.2110(b)(3)(iv)(A). *See NPRM* at ¶¶ 20-26.

[67] Over Auctions 58, 66, and 73, DE net winning bids declined dramatically, from approximately $921 billion in Auction 58, to approximately $549 million in Auction 66, to approximately $500 million in Auction 73. *See Auction 58 Closing PN, supra*; *Auction 66 Closing PN, supra*; *Auction 73 Closing PN, supra.*

[68] *See Auction 58 Closing PN, supra.*

all auction revenues. The results of Auction 73, which ended in March 2008, were even more disappointing for DEs: the net bids of qualified DE license winners were just 3% of all auction revenues.[69] At the recently concluded Auction 97, excluding the DISH DEs, only about 13% of the high bids, representing just over 2% of the total gross revenues, were made by DEs.[70] Repealing the AMR rule and utilizing a case-by-case standard, as proposed in the *NPRM*, will help reverse these disappointing results. As earlier noted, because there is a direct correlation between the cost of a license and the population served, the lower percentage expenditures of DEs in recent auctions results in DEs not providing spectrum-based services to a meaningful extent.

D. Eligibility to Retain DE Status Should Be Determined on a License-by-License Basis

ARC also strongly endorses the proposal to determine an entity's eligibility to retain small business benefits on a license-by-license basis,[71] rather than allowing a loss of DE eligibility with respect to a single license to adversely affect the licensee's DE eligibility with respect to other licenses. The simple reality is that a one-off transaction between a DE and a non-DE in a particular market should not adversely affect the licensee's continuing eligibility as a designated entity elsewhere. An example based on a real world situation best illustrates this point: A non-DE is interested in entering into a short-term lease of spectrum from a DE in order to establish a temporary communications network to be used for communication and security purposes at a major sporting event at a single venue. The DE declines to enter into this arrangement because it would result in the inclusion of the non-DE's revenues with the DE's attributable revenue, thus adversely

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[69] Moreover, as MMTC has demonstrated, licenses won by DEs in Auctions 66 and 73 were mostly for small markets, and were predominantly acquired by rural telephone companies. *See* MMTC White Paper, *supra*, at 14.

[70] *See Auction 97 Closing PN, supra.*

[71] *NPRM* at ¶ 31.

affecting the DE's eligibility to retain the discount for all of its licenses, including those unrelated to the business opportunity.

This should not be considered an isolated example. Unique situations can arise in any number of markets across the country which will result in the loss of DE eligibility on a license that is held by a DE-eligible group owner. It does not serve the public interest for transactions of this nature to disqualify the designated entity from retaining benefits on any other license not directly implicated in the transaction.

IV. Proposals to Increase DE Participation and Success

The Commission's objective in this proceeding should be to put in place rules that will further the statutory mandate of disseminating licenses among a wide variety of entities, particularly small businesses, including those owned by women and minorities. Although one auction design mechanism that could be considered consistent with the statute would be to set aside licenses for bidding solely by DEs, thereby ensuring that only DEs would be winning bidders, the Commission is right not to have proposed to hold such closed auctions. A set-aside auction is likely to result in DEs "bidding through" their discounts and paying higher prices for licenses than they would have in an auction that includes non-DEs, creating disincentives for participation and hurting capital formation efforts. Post-auction analyses of the C Block auction (Auction No 5) indicated that is exactly what happened in that set-aside auction: The average price per pop bid for licenses actually exceeded the price per pop paid in the earlier (non-set-aside) auction of A and B Block licenses.[72] When every bidder receives a discount, the discount has no meaning. In effect, the net outcome in Auction 5 was that the DEs received no discount or benefit at all.

[72] *See* Mark W. Munson, *Legacy of Lost Opportunity: Designated Entities and the Federal Communications Commission's Broadband PCS Spectrum Auction*, 7 Mich. Telecomm. & Tech. L. Rev. 217, 233 (the set-aside licenses in the C Block auction sold for $1.33/MHz pop as compared to $0.52/MHz pop for the A & B Block licenses).

In the Coalition's view, it would better serve DEs for the Commission to use a broad range of incentives, including adopting the proposed new DE eligibility criteria, and, as discussed below, raising the gross revenue thresholds, increasing bidding discounts for winning bidders, adopting a new "localism" bidding credit, and encouraging joint bidding arrangements between DEs and non-DEs. All of these changes should be in place sufficiently in advance of the BIA to provide adequate time for DEs to develop their business plans and auction strategies, including raising funds for license acquisition.

A. Gross Revenue Thresholds Should Be Raised

The Coalition supports the Commission taking a fresh look at facilitating auction participation through bidding credits tied to gross revenue thresholds. As noted in the *NPRM*, these thresholds have remained essentially unchanged since they were first adopted, and have become outdated given the substantially increased costs of spectrum acquisition.[73] Moreover, the incumbent wireless carriers against whom new entrants must compete have grown exponentially over time; thus, DEs truly will be "small" or "very small" on a relative basis, even if the revenue thresholds are increased.

The *NPRM* proposes to increase the existing gross revenue thresholds that define the three tiers of small businesses in the Part 1 rules, from $3 million, $15 million, and $40 million, to $4 million, $20 million, and $55 million, respectively.[74] The size of these proposed increases is based on the 36.4 percent increase in the U.S. Gross Domestic Product ("GDP") between 1997 and 2013.[75] ARC believes that the revenue thresholds serve a useful purpose in defining what constitutes an eligible small business. However, the proposed increases are far too small to bridge

[73] *NPRM* at ¶ 50.

[74] *Id.* at ¶¶ 52, 56.

[75] *Id.* at ¶ 56.

the significant gap in resources between small businesses and nationwide incumbents, and to enable small businesses to attract new capital. Rather than basing the increase on the GDP percentage increase, the Coalition proposes an alternative metric directly tied to increases in the cost of spectrum acquisition. Specifically, the Commission should adjust the gross revenue tiers based on the increase over time in the cost of auctioned spectrum on a MHz per pop basis. For Auction 97, the average MHz/pop cost was $2.53, an increase of 468% over the average $0.54 MHz/pop in Auction 58 ten years ago, and of 252% over the average $1.35 MHz/pop in Auction 73.[76] Based on this more relevant metric, and using Auction 58 and Auction 97 as the benchmarks, revenue thresholds for the three tiers of bidding credits could conservatively be increased by at least 200%, to $9 million, $45 million, and $120 million, respectively.

B. Bidding Credit Percentages Should Be Increased

In ARC's view, because the largest barrier to acquisition of licenses at auction by DEs is the cost of acquiring licenses through the auction process,[77] the size of the bidding discount tied to the revenue thresholds used to define "small business" is just as significant as the level of those thresholds. Therefore, in addition to redefining the current revenue thresholds – which the Commission should do in any event because those thresholds are outdated – the Commission also should increase the bidding discounts. The ever-increasing cost of auctioned licenses, coupled with the scarcity of below-1 GHz spectrum, make it critical that small businesses have an opportunity to successfully participate in the BIA, which is likely to be the last major auction of low-band spectrum.

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[76] *See* Incentive Auction Opportunities for Broadcasters, prepared for the Federal Communications Commission by Greenhill & Co., LLC, at p. 8 (Feb. 2015).

[77] Again, the Commission's focus on the size of the gross revenue thresholds and bidding discounts in the context of "facilitat[ing] a higher rate of participation" by DEs (*NPRM* at ¶ 58) is misplaced; instead, the Commission should focus on achieving the statutory objective of disseminating (i.e., granting) licenses to small businesses. In any event, the highest hurdle to participation in spectrum-based business is the high cost of entry through license acquisition at auction.

The likelihood of success, both in acquiring licenses at auction and in the provision of spectrum-based businesses, will be greater if the bidding credit percentages are increased. ARC recommends that bidding credits for the three revenue tiers be increased to 25%, 35%, and 50%, respectively.

As the results of Auction 97 make clear, spectrum acquisition costs are increasing, making capital formation and successful bidding by DEs increasingly difficult. Increasing the bidding discount, in combination with increased revenue thresholds, will have a direct impact on DEs' ability to compete at auction against the capital advantages of nationwide carriers, who have acquired the vast majority of auctioned licenses. Moreover, larger bidding credits will enable those DEs who have successfully acquired licenses at auction to then devote scarce capital to the network, customer acquisition, and operational costs needed to participate meaningfully in spectrum-based businesses.

C. The Commission Should Adopt a Localism Bidding Credit

As the Commission notes, its ability to adopt targeted bidding credits "is constrained by both its statutory authority and standards of judicial review."[78] Nonetheless, ARC believes the Commission can, consistent with applicable law, adopt a new, targeted bidding credit that will greatly increase small business interest and participation in auctions, leading to a broader dissemination of licenses among a variety of applicants.

ARC proposes that DE applicants with an attributable (10% or greater) interest holder who has been a resident for more than one year of an unserved or underserved area or of a persistent poverty area should receive an additional bidding credit for any license that covers such an area. Such a "localism" bidding credit would have many immediate benefits. First, it would generate greater interest in obtaining licenses for and providing service to such areas, particularly among new entrants, consistent with the Commission's statutory mandate to "ensure that small businesses . . .

[78] *NPRM* at ¶ 65.

and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences."[79] Second, the additional discount would further level the playing field for small businesses competing against incumbents with ready access to capital markets. Third, a localism credit would promote broader dissemination of licenses among a variety of entities, thereby benefiting "businesses owned by minority groups and women," as Congress intended.[80] Finally, applicants would be encouraged to reach out to and include residents of underserved areas in their bidding group, adding diversity to the applicant pool and increasing the prospects that serving that area would be given a higher priority if the applicant won that license.

Because a localism credit is race-neutral, it would not be subject to the strict scrutiny standard of review applied by the Supreme Court in *Adarand*.[81] Because it also is gender-neutral, it would not be subject to the "heightened scrutiny" standard applied by the Supreme Court in *VMI*.[82] The Commission has been clear that *Adarand* and *VMI* effectively have precluded it from adopting any preferences targeted to minorities and women. A localism credit would not face the same high hurdle. Indeed, courts have applied the rational basis standard of review to preferences based on residency duration.[83]

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[79] 47 U.S.C. § 309(j)(4)(D).

[80] 47 U.S.C. § 309(j)(3)(B).

[81] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("*Adarand*") (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

[82] *United States v. Virginia*, 518 U.S. 515, 555-556 (1996) ("*VMI*") (holding that "'all gender-based classifications today' warrant 'heightened scrutiny,'" and that the Commonwealth showed no "exceedingly persuasive justification" for its gender-based classification).

[83] *See, e.g., Buchwald v. University of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998) (holding that "it was not unreasonable for the defendants to believe that using duration of residence as a plus factor to gauge an applicant's propensity to practice [medicine] in [the state] was a constitutionally

D. The Commission Should Encourage Pro-Competitive Joint Bidding Arrangements Between DEs and Non-DEs

The *NPRM* contains a thorough discussion of the Commission's policies governing joint bidding arrangements.[84] The Commission tentatively concludes that it would serve the public interest to retain the current rules governing joint bidding and other arrangements among non-nationwide providers.[85] The Coalition supports this conclusion.

Joint bidding arrangements among non-nationwide licensees can enable smaller companies to pool their resources and compete effectively for licenses that they would be unable to acquire on their own. This is particularly important given the continued increase in the cost of spectrum and the expansion of the geographic scope of regional systems. In light of the evolution of the wireless marketplace, it is nearly impossible for a service provider to offer a commercially viable service on a stand-alone basis in an isolated market. Joint bidding arrangements create an avenue for non-nationwide applicants to expand their sphere of influence in the auction.

Based on the experience of Coalition members in prior auctions, the Commission is correct that the existing procedural requirements pertaining to joint bidding arrangements are effective. Requiring joint bidding arrangements to be disclosed in advance on the short-form application, and subjecting the actual agreements to a thorough review in the post-auction long-form application process, provide an effective deterrent against anti-competitive arrangements. And, because the disclosure of agreements does not serve to immunize them from the reach of antitrust laws, applicants are properly disinclined to enter into agreements that will result in collusive behavior.

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permissible means to increase the provision of medical case to underserved portions of the state," nor contrary to "the constitutional power of Federal and State governments to act affirmatively to achieve equal opportunity for all," *id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

[84] *NPRM* at ¶¶ 107-140.

[85] *Id.* at ¶ 120.

ARC takes no position on the question of whether nationwide carriers should be prohibited from entering into joint bidding arrangements among and between themselves. However, the Coalition can foresee circumstances in which a joint bidding agreement between a DE and a national carrier could be pro-competitive. For example, a national carrier might have the wherewithal to acquire a license and build out a robust system in a major metropolitan area, while a smaller participant might choose to focus its efforts on a second tier market. Cooperation between the incumbent and the DE could result in their mutual ability to provide a seamless, technically-compatible service over a larger area in a shorter time frame than if they acted separately. The Commission should be careful not to ban pro-competitive arrangements of this nature. Once again, the existing requirements regarding the disclosure and filing of cooperative arrangements in the course of the auction provides an effective mechanism for ferreting out anti-competitive agreements without banning potentially beneficial arrangements.

V. A DE Should Not Lose Bidding Credits Based on Construction Requirements

The *NPRM* asks whether the Commission should require full reimbursement, plus interest, if a small business loses its eligibility prior to meeting the construction requirements applicable at the end of its license term.[86] Such an approach would represent a serious step backward in the Commission's regulatory philosophy.

In the early days of the wireless services industry, a Commission rule prevented the assignment of an unbuilt station.[87] This rule was a well-intentioned effort to deter speculation in licenses and to encourage the prompt construction of stations and the provision of services to consumers. Unfortunately, the rule had the unintended result of encouraging certain permittees to

[86] *NPRM* at ¶ 46.

[87] *See* 47 C.F.R. § 22.40 (a)(2) (1992) (restricting cellular assignment or transfer applications that "[i]nvolve facilities that have not been constructed.").

build so-called "license saver systems." These systems were not constructed and operated to provide beneficial services to the public, but rather were designed for the sole purpose of meeting the Commission-imposed construction requirement so that a sale of the license could occur. Ultimately, the Commission reconsidered this approach and eliminated the ban on the sale of a "bare license."

Forcing DEs to lose bidding credits if a license is sold prior to end-of-term construction requirements have been met would have the same pernicious effect. Permittees would be incented to "build" systems simply to satisfy the applicable construction requirement, rather than adopting a construction roll-out plan adapted to public demand and local market conditions.

A DE licensee with every intention of constructing and operating a particular system can receive a *bona fide* unsolicited offer on a particular license or permit before the applicable construction requirement has been met. Allowing such a transaction to proceed is entirely consistent with the Commission's oft-stated policy of seeking to ensure that every license ends up in the hands of the party that values that license most highly. In contrast, a rule that prohibits a DE licensee from retaining a bidding credit on a station that has not met the construction requirement will either deter the sale or force construction that is less than optimal. The Commission should not adopt such a prohibition. Rather, the Commission should rely upon the current five-year unjust enrichment repayment rule, which requires the payback of a greater portion of the discount if the licenses is sold earlier in the term.

VI. Conclusion

For all of the foregoing reasons, the Auction Reform Coalition urges the Commission to adopt its DE rules as discussed in these Comments.

Respectfully submitted,

THE AUCTION REFORM COALITION

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